

Order 97-11-22

Served: November 13, 1997



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 13th day of November, 1997

Applications of

JAPAN AIRLINES COMPANY, LTD.

for exemptions under 49 U.S.C. § 40109

Dockets OST-95-971
OST-95-842

ORDER GRANTING EXEMPTION

Summary

In this order we are granting Japan Airlines Company, Ltd. (JAL), a foreign air carrier of Japan, exemptions from section 41301 of Title 49 of the U.S. Code to conduct scheduled combination services (1) between Tokyo and Kona, Hawaii, and (2) between Tokyo and Atlanta, Georgia, for a period of 179 days.

Background

During 1985 and 1989 the United States and Japan signed interim agreements, embodied in Memoranda of Understanding (1985 MOU and 1989 MOU), which provide for, among other things, certain services by the designated carriers of Japan. By Order 97-5-16, we granted JAL exemption authority to engage in scheduled foreign air transportation of persons, property and mail (1) between Tokyo, Japan, and Atlanta, Georgia, and (2) between Tokyo, Japan, and Kona, Hawaii, for a period of 179 days.¹ We made the authority subject to the terms and

¹ Since the duration of JAL's authorities were for a period of fewer than 180 days, they were not licenses with reference to activities of a continuing nature within the meaning of 5 USC 558(c). See 14 CFR Part 377.

conditions of JAL's foreign air carrier permit and the 1989 or 1985 MOU, respectively.²

Application

By application filed September 17, 1997, JAL seeks to renew its exemption authorities to conduct scheduled combination services (1) between Tokyo and Atlanta under the 1989 MOU, and (2) between Tokyo and Kona under the 1985 MOU. Renewal of these authorities will permit JAL to operate up to seven weekly frequencies in the Tokyo-Kona market and three weekly frequencies in the Tokyo-Atlanta market.³ JAL requests that the authorities be renewed for a period of not less than one year.

In support of its requests, JAL states that the authorities requested are consistent with the 1989 and 1985 MOU's. JAL further states that it has been designated by the Government of Japan to perform the proposed services and that its services will benefit the traveling public.

Responsive Pleadings

Answers to JAL's request were filed by Northwest Airlines, Inc., United Air Lines, Inc., and the State of Hawaii. Additional responsive pleadings were filed by JAL, Northwest and Hawaii.⁴

Northwest urges denial of JAL's requests due to Japan's refusal to allow Northwest to operate bilaterally-authorized Fifth Freedom services beyond Osaka to Jakarta, Indonesia, and Kuala Lumpur, Malaysia, with full traffic rights.⁵ Northwest states that in spite of bilateral negotiations between the United States and Japan that have been ongoing for many years, Japan steadfastly continues to

² JAL holds a foreign air carrier permit issued by Order 70-8-66. JAL also holds various exemptions to perform specified services between Japan and the United States.

³ JAL states that it is seeking to renew its existing combination authority to serve (1) Tokyo-Kona on a non-stop basis; (2) Tokyo-Kona on a one-stop basis via Honolulu; and (3) Tokyo-Atlanta on a non-stop basis.

⁴ The comments of Northwest and the State of Hawaii were accompanied by motions for leave to file otherwise unauthorized documents. We will grant the motions.

⁵ On July 3, 1996, Northwest filed a complaint under 49 USC § 41310 against the Government of Japan in response to Japan's refusal to authorize Northwest's proposed Seattle-Osaka-Jakarta service, in violation of the U.S.-Japan bilateral aviation agreement (the Agreement). See Docket OST-96-1500. The Department approved Northwest's complaint by Order 97-2-10, but deferred on the issue of sanctions.

withhold bilaterally-agreed rights from U.S. carriers. Northwest adds that negotiations with Japan to resolve the issue of Northwest's beyond rights have been unsuccessful, and that it is time for the Department to respond by taking "decisive action" against Japan by terminating some of JAL's existing authority.

United and Hawaii urge us to renew JAL's requests. United states that denial of JAL's request could severely damage U.S.-Japan aviation relations at a time when the U.S. is making progress toward a new liberalized bilateral aviation regime with Japan. United further states that Japan has previously conditioned the continuation of increases in United's Tokyo-New York services on our approval of JAL's Atlanta and Kona authority. Hawaii supports prompt renewal of JAL's request for a period of at least one year. Hawaii states that while it supports efforts by the United States to conclude a liberal bilateral aviation agreement with Japan, the "immediate and compelling needs" of Hawaii for bilaterally-agreed services should not be held hostage to "unrelated" issues. In that regard, Hawaii states that while it is sympathetic to the concerns raised by Northwest, Hawaii should not bear the economic brunt of the sanctions proposed by Northwest.

JAL states that we should reject Northwest's call to terminate its authority. It urges us to renew the requested authority for a period of not less than one year.

Decision

We have decided to grant JAL the exemption authorities it seeks to engage in scheduled foreign air transportation of persons, property and mail (1) between Tokyo, Japan, and Atlanta, Georgia; and (2) between Tokyo, Japan, and Kona, Hawaii. JAL may serve Kona on both a non-stop basis and a one-stop basis over Honolulu.⁶ The authorities will be effective for a period of 179 days from the service date of this order, and will be subject to the terms and conditions of JAL's foreign air carrier permit and the 1989 or 1985 MOU, respectively.⁷ The requested authorities are provided for in the appropriate MOU and JAL has been designated by its government to perform the services requested.

While we have decided to grant a limited extension of JAL's authorities, we continue to be sensitive to the concerns raised by Northwest. However, as we

⁶ It is our view that JAL's authority in Order 97-3-41 was superseded by the authority we granted JAL in Order 97-5-16. Order 97-5-16 was intended to allow JAL to serve the Tokyo-Kona market not only on a non-stop basis, but also on a one-stop basis via Honolulu.

⁷ Since the duration of JAL's authorities is for a period of fewer than 180 days, these are not licenses with reference to activities of a continuing nature within the meaning of 5 USC 558(c). See 14 CFR Part 377.

previously stated in considering JAL requests for authority in these markets, we do not regard this as the appropriate forum for addressing these concerns. Order 97-5-16 at 5. In this connection, we have made specific reference to Northwest's pending IATFCPA complaint in Docket OST-96-1500 and to the favorable findings we made on that complaint in Order 97-2-10. *Id.*⁸ We noted our decision that the public interest would best be served if we deferred implementing sanctions while discussions with Japan were ongoing.

Since January 1997, delegations representing the United States and Japan have held informal as well as formal negotiations aimed at exploring various issues in the relationship, including the Fifth Freedom issues raised by Northwest here and in its complaint. Consultations continue, with further talks scheduled for November 14 and 15, 1997, in San Francisco. In light of these consultations, we believe that the limited 179-day extension of JAL's authorities is appropriate while we work to reach an agreement with Japan.

ACCORDINGLY,

1. We grant Japan Airlines Company, Ltd. an exemption from section 41301 of Title 49 of the U.S. Code to permit it to engage in scheduled foreign air transportation of persons, property and mail between Tokyo, Japan, and Atlanta, Georgia, on a non-stop basis (subject to the conditions of the 1989 MOU);
2. We grant Japan Airlines Company, Ltd. an exemption from section 41301 of Title 49 of the U.S. Code to permit it to engage in scheduled foreign air transportation of persons, property and mail between Tokyo, Japan, and Kona, Hawaii, on a non-stop basis and a one-stop basis over Honolulu, Hawaii, (subject to the conditions of the 1985 MOU);
3. The authorities granted in ordering paragraphs 1 and 2 above shall be effective for 179 days from the service date of this order;
4. The authorities granted in ordering paragraphs 1 and 2 above are subject to the conditions of Japan Airlines' foreign air carrier permit (Order 70-8-66);
5. We grant the motions of Northwest Airlines, Inc. and the State of Hawaii to file otherwise unauthorized documents;
6. To the extent not granted, we deny any additional requests for relief in Dockets OST-95-971 and OST-95-842;

⁸ Regarding Northwest's complaint, see note 5, supra.

7. We may amend, modify or revoke this authority at any time and without hearing; and

8. We will serve a copy of this order on Japan Airlines Company, Ltd.; Northwest Airlines, Inc.; United Air Lines, Inc.; the State of Hawaii; the Embassy of Japan in Washington, D.C.; the Department of State (Office of Aviation Negotiations) and the Federal Aviation Administration (SF-IFO).

By:

CHARLES A HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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